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January 29, 1999

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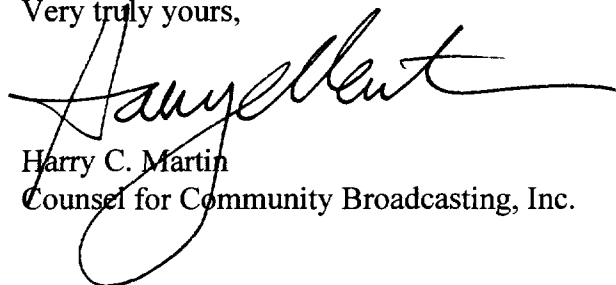
Re: MM Docket No. 95-31

Dear Ms. Salas:

Transmitted herewith on behalf of Community Broadcasting, Inc. are an original and four copies of its comments in the above-referenced proceeding. Leave to file these comments one day late is hereby requested. Community planned to use the Commission's Electronic Comment Filing System (ECFS), but it was not functioning yesterday, January 28, 1999, the extended due date for comments. Nor was the alternate electronic filing site available. A copy of the Commission's notice, posted on its Web site yesterday, indicating the ECFS system was unavailable for use, is attached.

Should any question arise concerning this matter, please communicate with the undersigned.

Very truly yours,



Harry C. Martin  
 Counsel for Community Broadcasting, Inc.

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FEDERAL COMMUNICATIONS COMMISSION  
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The Electronic Comment Filing System is designed to give the public access to FCC rulemakings and docketed proceedings by accepting comments via the Internet. ECFS also allows you to research any document in the system including non-electronic documents that have been scanned into the system. ECFS includes data and images from 1992 onward.

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of )  
 )  
Reexamination of the Comparative ) MM Docket No. 95-31  
Standards for Noncommercial )  
Educational Applicants )

TO: The Commission

**COMMENTS OF COMMUNITY BROADCASTING, INC.**

Community Broadcasting, Inc. ("Community"), through its counsel, hereby files these Comments in response to the Commission's *Further Notice of Proposed Rulemaking* ("*Further Notice*")<sup>1</sup>, released October 21, 1998, in the above-captioned proceeding. The Further Notice introduced a number of proposals relating to the award of channels for reserved-band noncommercial educational (NCE) spectrum to competing applicants through either a lottery or point system. Community strongly urges the Commission to reject the proposed lottery system and to adopt a variation of the proposed point system. In support thereof, the following is shown:

**I. BACKGROUND**

**A. Community Broadcasting, Inc.**

Community is a non-profit membership corporation which is dedicated to the advancement of charitable, religious, civic, cultural and educational organizations and causes. Community was organized for the purpose of promoting educational objectives by devoting a significant portion of

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<sup>1</sup> *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 63 Fed. Reg. 67439 (released October 30, 1998) ("*Further Notice*").

its broadcast time to educational, religious and informational programming which addresses the interests and concerns of the residents of each community it serves. It currently operates noncommercial educational stations KSIV-FM, St. Louis, Missouri and KLCV(FM), Lincoln, Nebraska, and KCRL(FM), Sunrise Beach, Missouri. These stations are operated on a non-profit basis and provide noncommercial informational programming to their respective communities of license.

Community is also a competing applicant for noncommercial educational broadcast stations in the reserved spectrum for the following channels: Channel 203C2, Piedmont, Oklahoma; Channel 220A, Savannah, Missouri; Channel 209A, Country Club, Missouri; and Channel 216C2, St. Joseph, Missouri. As a participant in public radio, Community is vitally concerned that the Commission's comparative selection criteria be consistent with the public interest and support the goals of securing access for all Americans to the benefits of noncommercial educational programming.

## **B. The Commission's Proposal**

The Commission's Further Notice proposes three options for comparing competing applicants of NCE spectrum: (1) to maintain the current selection method of comparative hearings; (2) to eliminate the comparative hearing process and use a lottery system; and (3) to eliminate the comparative hearing process and use a point system.

Under the hearing system, competing NCE applicants for NCE spectrum are not compared using the same criteria as those previously used for commercial applicants. Rather, NCE applicants are chosen by administrative law judges after an evidentiary hearing to determine which of the proposed operations will be best integrated into the overall educational operations

and objectives of the applicant.<sup>2</sup> Other deciding factors include: areas and population served, hours of operation, and promises to install auxiliary power equipment. Upon examination of its policies regarding comparative broadcast hearings for NCE stations, the Commission stated that "use of such a vague standard may make rational choices among noncommercial applicants difficult, if not impossible."<sup>3</sup> In that same proceeding the Commission tentatively concluded that the existing standard should be eliminated and suggested using a modified version of the point system it proposed for commercial applicants. While some commenters to the original Notice of Proposed Rulemaking believe that comparative hearings afford substantial discretion to Commission decision makers, the Commission and other commenters point out that selection often turns on minimal distinctions.

Community believes that while lotteries would be more practical than hearings, lotteries leave selection of the applicant completely to chance. Moreover, the Commission, itself, considered replacing comparative hearings with lotteries in its *Proposals to Reform the Comparative Hearing Process*, 5 FCC Rcd 4050 (1990), and concluded that replacing comparative hearings with a lottery system was not warranted.

Unlike lotteries, the point system proposed would be the best selection method because it would select the best qualified applicant. Like lotteries, however, a point system would be easy to administer. Under the proposed point system, an applicant would receive a specified number of points based on its attributes under certain comparative criterion. The winner in such a

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<sup>2</sup> *New York University*, 10 RR 2d 215, 217-218 (1967).

<sup>3</sup> *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2669 (1992).

proceeding then could be determined by adding up the total number of points to which each applicant is entitled. The applicant receiving the highest number of points would be granted the permit. The total number of points would also reflect the overall public interest in granting the application. By comparing the point totals of different applicants, the Commission would be able to provide an objective and rational basis with which to evaluate the public interest in granting one application over the other. Furthermore, such an approach would be wholly consistent with the Commission's goal of serving the Section 307(b)<sup>4</sup> mandate of fair, efficient and equitable distribution of service among communities.

## **II. Discussion**

### **A. The Point System Promotes the Objectives of Section 307(b)**

Pursuant to Section 307(b), broadcast service should be fairly, efficiently and equitably distributed among the various states and communities. The FM Table of Allotments was created to allow the Commission to meet its obligation under Section 307(b) and the allotment priorities, developed in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 91 (1982), were intended to promote this statutory goal. The main objective of the 1982 revision was to provide service of satisfactory signal strength to the whole country, while providing as many program choices to as many listeners as possible and providing service of local origin to as many communities as possible. To these ends, the Commission set forth the following as priorities: (1) first full-time aural service; (2) second full-time aural service; (3) first local service, and; (4) other public interest matters (priorities 2 and 3 were given co-equal weight).

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<sup>4</sup> Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b) (hereafter "Section 307(b)").

In the present rulemaking proceeding, the Commission proposes to utilize similar selection criteria in awarding points to competing NCE applicants under the second criteria for fair distribution of service. Under that criteria, points will be awarded for the following: (1) first full-time NCE aural or TV service (2 points); (2) second full-time NCE aural or TV service (1 point); and (3) first local service (1 point). In addition, points will be awarded for local diversity (2 points), technical parameters (1 point) and other factors (i.e. minority control credit and local educational presence credit).

The proposed system is similar to one that the Commission successfully employed in the Instructional Television Fixed Service (ITFS), *see* Section 74.913(b); and the FM translator service, *see* Section 74.1233(f). Because these systems are designed to select the best qualified applicant, they are superior to lotteries provided that the selection criteria are unambiguous and consistent with the public interest goals the Commission has historically promoted. As shown below, the point system proposed for NCE-FM and NCE-TV, with only minor modifications, will provide the best available selection method by favoring applicants whose proposals would clearly advance these very public interest goals.

## **B. Community's Alternative Proposal for Allocation of Points**

### **1. Fair Distribution of Service**

In the Commission's *Further Notice*, it proposed to award points for four specific criteria: (1) local diversity, (2) fair distribution of service, (3) technical parameters and (4) other public interest matters. Under the fair distribution of service criteria, the FCC would allot only one point for providing a first local service, whether the service is first NCE or simply a first service. Instead, two points should be awarded for providing a first or second local service that also is a

first NCE service, with a single point awarded for providing a first NCE service that is not a first or second local service. This revised formula would accommodate situations where a community has either no other local station or only one other, but no noncommercial station. In both cases, the applicant would be providing the local community not only with its first public broadcast voice, but more importantly from a Section 307(b) perspective, a first or second local service. By making first or second local service a threshold requirement for a two-point award, the Commission would not depart from its long-standing policy of treating commercial and NCE services as equal for purposes of evaluating allocation priorities. *See Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7097 and n.19 (1990); *Valley Broadcasters, Inc.*, 5 FCC Rcd 2785, 2788 (1990). Rewarding with two points a proposal to provide a second local service that also is NCE balances the Commission's interests in promoting NCE broadcasting with the more traditional Section 307(b) priorities which, for instance, would consider establishment of a second local aural service under FM allocation priority number four (4). *See Revision of FM Assignment Policies and Procedures, supra*. Awarding a single point for providing a first NCE service that is neither a first nor second local service appropriately rewards the public interest benefit of such a new station balanced against the core Section 307(b) goals of providing a first or second local service.

To ensure that the upgraded local service credits being suggested are meaningful, communities having populations of less than 2,500 people should not be eligible. This is a reasonable cut-off point because the provision of a first or second local service to a community of 2,500 or more, when that service is a first NCE service, provides a sufficient public interest to warrant receiving a credit equivalent to, as suggested below, the award for providing a first



reception service, or a second reception service that is a first NCE aural service, to populations that may be less significant.

Community proposes a similarly modified scheme for awarding points for providing unique reception services. Unlike the Commission's proposal, Community does not favor awarding points for providing a first or second NCE service unless such service also is, regardless of its status as commercial or noncommercial, a first or second reception service. Community suggests that two points be awarded to an NCE applicant which would provide a first reception service, the highest FM allocation priority. In keeping with the Commission's goal in this proceeding to promote NCE broadcasting, two points should also be awarded to applicants also would provide a second reception service provided such second service is a first NCE service. A single point should be awarded, as currently proposed, for providing a second NCE service that is neither a first or second reception service.

As noted above, these proposed changes are intended first to serve core Section 307(b) allocations priorities, which do not distinguish between commercial and noncommercial facilities or applications, and second -- but only after consideration is given to the statutory threshold -- to promote NCE broadcasting.

## **2. Technical Parameters**

The Commission also proposes to award one point to applicants having 10 percent or greater coverage of areas and populations *vis-a-vis* competing proposals. Furthermore, the Commission proposes to give two points for coverage that is far superior than that proposed by other applicants. For instance, the Commission would give two points to an applicant whose proposal has 10 percent or greater coverage than a second proposal which, in turn has 10 percent

or greater coverage than a third proposal. In this situation the Commission would award two points to the first applicant, one point to the second applicant and no points to the third applicant.

Community takes issue with making any award based on a 10 percent difference in areas and populations. This is not a significant difference, particularly in well-served areas. Also, a change in site after the award of a construction permit, which is common, could negate the benefit which the 10 percent standard is intended to promote. To ensure that the technical parameter criteria are meaningful, there needs to be a minimum of a 50 percent difference in coverage area to warrant the award of points. This not only would provide a reasonable offset that takes into consideration the lesser value a new reception service has in a well-served area, but, in the FM service, also provides an automatic monitoring mechanism for post-grant facility changes.

Section 73.3573(a)(1) of the rules provides that a change of 50 percent or more in the area served by a noncommercial FM station constitutes a "major" change. Such applications are subject to petitions to deny, competing applications and other procedural constraints. On the other hand, a permittee who was awarded points based on only a 10 percent advantage could file a post-grant minor change and thereby negate the public interest consideration leading to its grant. Thus, to promote reliability, certainty and simplicity in application processes, a 50 percent standard would be preferable to the proposed 10 percent standard. In addition, by setting a higher standard, the Commission would eliminate the potential problem of having to award two points to an applicant with a ten percent greater area and population to be served than another proposal who has a ten percent greater coverage than a third proposal. Such a two-point award could offset an award for providing a first reception service, a far more worthy public interest value. In addition, as noted above, a 50 percent standard effectively addresses the issue of comparative coverage in well-

served areas. (In underserved areas, as discussed above, applicants would receive points for providing new services). Community urges that if the technical parameter standard is not increased, the Commission should eliminate it altogether because a difference of 10 percent in area of coverage is an insignificant difference.

### **III. Conclusion**

Mutually exclusive applications for NCE licenses should be selected using the point system. Neither comparative hearings nor lotteries are in the public interest. Comparative hearings are costly, burdensome and lengthy. Lotteries, while faster and less expensive than hearings, leave the actual selection of applicants to chance. Unlike both of those processes, a point system would award licenses quickly, effectively and objectively while considering the individual attributes and qualifications of the applicants to select the best applicant -- the applicant that satisfies the public interest requirements of the Communications Act. Community urges the Commission to adopt the point system as its method of selection between mutually exclusive NCE applicants.

Community, however, also urges the Commission to consider adopting Community's proposed modifications to the point system. The Commission should award two points for providing a first local transmission service and two points for providing a second local transmission service when that service is NCE. Similarly, the Commission should award two points for providing a first reception service or a second such service when it is NCE. This revised plan promotes both core Section 307(b) allocations priorities and the Commission's goal in this proceeding to foster educational broadcasting by choosing the best applicants. Moreover, Community urges the Commission to set a higher standard of coverage in its technical parameters

criteria by increasing its proposed cut-off from a 10 percent area or greater area of coverage to a 50 percent standard. This would be a more reliable predictor of coverage, particularly in well-served areas and would ensure the permanence of the facility proposals for which awards are made.

Respectfully submitted,

COMMUNITY BROADCASTING, INC.

By: \_\_\_\_\_

  
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January 28, 1999

\*Bar Admission Pending